APPENDIX B

INFORMATION TECHNOLOGY STANDARD CONTRACTS INCLUDING REQUIRED TERMS AND CONDITIONS

PURPOSE

Appendix B provides information technology standard contracts for Computer and/or Telecommunications Equipment and Associated Services; Software License and Associated Services; and Purchased and Associated Services. These standard contracts include clauses which are required as well as optional use clauses. These are for use by state agencies in developing agency solicitation documents such as Requests for Proposals (RFPs), Requests for Quotations and Qualifications (RFQQs), Requests for Quotations (RFQs), and as a basis for both competitive and sole source contracts. The use of these standard contracts meets the requirement of the Information Services Board (ISB) policy, *Acquisition and Disposal of Information Technology Resources in Washington State Government*

How a contract is written is of critical importance to the contracting process. If a contract is written clearly, the Vendor is more likely to perform the work correctly and the agency is more likely to monitor and audit effectively. The most creative service concept or generous dollar allocation can end in failure when conveyed through a poorly written contract. An effective contract is one which is both legally and technically sufficient. Legal sufficiency ensures that the contract is enforceable in court and contains language required by the Attorney General's Office. Technical sufficiency ensure that the contract expectations are complete and understandable.

CONTRACT CLAUSES (terms and conditions)

The clauses consist of two types: Required terms which are mandatory in content, meaning that agency contracts must cover the subject of the provision but need not necessarily use the exact language recommended, and the remaining terms with language which may be negotiated between agency and vendor. The provisions not identified as required terms are generally good business practice to include and their use is encouraged. In developing a contract, or a competitive solicitation document, optional clauses should be selected to meet specific contract needs. These clauses are intended to provide a basis for negotiation with the vendor, not a final set of terms and conditions. Not every clause will be required in every contract, nor will these clauses satisfy every contract need. In a competitive acquisition, any contract requirements should be carefully selected from these listings and other sources as necessary, and then tailored to meet specific functional and operational needs.

These standard contracts include provisions which will result in contracts which are fair to the vendor and provide good business sense to the state. However, all contracts must be written specific to the work to be performed with advance planning and thought given to the scope of work to be performed or products to be purchased/licensed and the protections necessary to that respective contract purpose.

TYPES OF CONTRACTS

Standard contracts are included in this Appendix for Equipment Purchase, Software License and Purchased Services. Appendix B does not include standard contracts for "turnkey" (i.e., combined hardware, software and applications systems) or software development contracts. These contracts normally require careful tailoring to include specific and unique performance and work expectations, and the standard contracts in Appendix B are not intended to wholly satisfy these kinds of contracts; they will, however, provide a good

starting point for these specialized contracts and the required terms must be used. When you have a combination contract (e.g., hardware and software; software and services), begin with the standard contract which conforms with the major purpose of the contract and import applicable terms from the other standard contract(s).

Also not included is a standard personal services contract, please contact the Office of Financial Management for contracting requirements for personal services. In addition, if the personal services are information technology related, contact the DIS coordinator assigned to your agency.

USE

Every acquisition of information technology resources from a vendor requires a contract. The contract may be as simple as a one-time purchase order, or it may require complex provisions covering ongoing relations with the vendor.

- Contract Negotiations. Negotiations should eliminate any ambiguities in the vendor's proposal and clarify contract terms. The agency's primary consideration during contract negotiations is to reach a mutually advantageous position on issues of mutual concern while fulfilling administrative and technical requirements. The recommended approach in negotiations is not to acquire an unfair advantage or to make unreasonable demands of the vendor, but to secure the most favorable terms and conditions for the state.

  In a successful negotiation, both parties feel they have won something. Negotiation for mutual gain should be the underlying attitude in successful negotiation sessions. Negotiated solutions are effective when each party has a stake in maintaining the conclusion. Throughout the process, the negotiator must establish and continue sound, cooperative, and respectful relationships with the other party. Inquisitive, exploratory, purposeful, yet diplomatic probing can produce the knowledge required to make smart business decisions in negotiations.

- Contract Required. For every competitive acquisition or negotiated sole source acquisition, an agency is required to include the required terms (together with appropriately tailored negotiable clauses) in the solicitation document (e.g., RFP or RFQ) when issued, and as a basis for negotiating the resulting contract.

  For simple acquisitions (e.g., low volume, off the shelf, or small dollar magnitude and not involving continuing payments or ongoing relationships with the vendor) agencies may, in lieu of developing a contract, use the Department of General Administration's standard purchase order.

  A formal writing must be prepared which accurately documents all terms and conditions and records the intent and agreement of the parties. This writing is the culmination of the entire procurement process and formalizes the agreement between the parties.

  Resources may be acquired through the use of state developed vendor contracts. While vendor standard form contracts provide protection for the vendor, they do not necessarily provide adequate protection for the state. With either, it is desirable for agencies to develop a contract which specifies resources to be acquired and protects both Vendor and agency interests. This Appendix provides a starting point.

How to Complete a Contract Using a Standard Contract

If a standard contract from this Appendix is included in the contracting requirements of a solicitation document, it provides the basis for subsequent negotiation with the apparently successful vendor.

If negotiating with a sole source vendor, or if no sample contract was used in the solicitation document, it is still required that a standard contract from this Appendix be developed and used to open contract discussions. Using these standard contracts should provide an adequate degree of protection and clarity for the agency and the state.

1. Use the standard contracts in this Appendix to identify applicable terms and conditions. Use all terms and conditions that apply (for example, a single contract may include hardware purchase, licensed software, and purchased services). Note that the intent of required terms must be included in every contract (except where a purchase order will suffice).
2. The optional clauses may be tailored to fit the contract with specific language negotiated with the vendor. To assist in the selection and tailoring of the optional clauses, the standard contracts provide a brief description of the provisions, together with comments on their use.
3. Modify the wording of selected provisions as appropriate.
4. Add any provisions necessary to complete the contract.
5. Construct a draft of the contract and review it with the agency Assistant Attorney General for your agency. Attach any referenced schedules, exhibits, etc., at the end of the contract.
6. Negotiate the contract.
7. Obtain agency Assistant Attorney General review and approval as to form two copies of the contract.
8. Obtain DIS Office of Information Technology Oversight (OITO) approval, if required.
9. If possible, obtain the vendor's signature on the contract before you sign.
10. Obtain the signature on the contracts of the authorized person in your agency. Give one to the vendor; keep the other copy.

Working with Vendor Contracts

Often the standard vendor contract will contain some provisions that are satisfactory for a portion of the final contract. If so, the agency may wish to include the appropriate vendor provisions by reference in the "Opening Paragraph" of the contract, and by attachment. Be sure to indicate the hierarchy of the provisions—that is, the state's language takes precedence over vendor's language in the event of a conflict. The steps to be followed are the same as outlined above, except that the vendor contract should be attached to the draft produced from the standard contracts. Strike out any provisions in the vendor contract that are inappropriate and have the vendor initial as well as the signing authority in your agency.

Should a vendor contract include most of the provisions that may be satisfactory for the final contract, the agency may choose to utilize the vendor contract and attach missing required terms as well as appropriate supplemental or amending provisions. Modifications to vendor language and any required provisions not contained in the vVendor contract should be attached and referenced as inclusions in the "Opening Paragraph." Be sure that vendor provisions do not give inappropriate advantage to the vendor. As with all contracts, a review by the agency Assistant Attorney General, and DIS OITO when required, is necessary before signatures are affixed.

Tips for Using the Standard Contracts

- Items which are in italics in hard brackets *[like this]* are locations where specific information on the contract being drafted must be inserted. For example, the standard clause on Liquidated Damages does not include a dollar amount for such damages; instead it includes that the vendor shall pay "...an amount of *[fixed dollar amount per day or percentage of total cost (purchase price plus applicable tax and shipping)...]*"

- Explanations of the contract clauses are indented left and right and **bold**. After the contract has been completely negotiated, locate and delete any remaining explanations. (Note for MS Word users: the explanations are in a Style titled Instructions. After the contract has been completely negotiated, search for and delete any remaining text in that Style.)

- Negotiate the specifics of the contract, e.g., in the section titled Maintenance and Support Services, "toll-free telephone service hotline" may be modified to toll call during negotiation.

- Use justifiable, supportable numbers (e.g., response times, liquidated damages) any time they are included.

- If you remove a contract clause (e.g., liquidated damages) or an attachment (e.g., Schedule A because only one product is offered) and it is listed or referenced in the body of the agreement, search the remainder of the contract for any references to such clause or attachment and delete/reword those references as applicable.

- Insurance is required "only when necessary." General rules for necessity include: the General Business/Commercial Liability should be required only when the contract (or the specific statement of work under a "blanket" contract) is large (e.g., greater than $1 million), or the exposure to the purchaser is significant; however the Public Liability Insurance and Automobile Insurance is appropriate for all contracts.

Software Licensing Issues: There are two distinct categories of software contracts. The first is commercial off-the-shelf (COTS) software in which many vendors have their own standard agreement. However, the vendor agreements are negotiable. By providing a standard software agreement, agencies will have an idea, when presented with a vendor form contract, which provisions to seek changes to and what changes should be made. The second category is developed software where the state will have ownership of some or all of the software. In this case, many of the terms and conditions (Ts & Cs) (if not all) are applicable with some modification to denote the state's ownership of the developed software where appropriate (as opposed to licensing and/or modification of licensed software).

Standard Purchase Order

Many times a purchase may not require negotiation or the longer form standard contracts Generally, these types of acquisitions are of low volume and/or off the shelf or small dollar magnitude and do not involve continuing payments or ongoing relationships with the vendor. Here, it is acceptable to use an agency purchase order.

However, the purchase order should contain the general terms and conditions developed by the Department of General Administration, which are consistent with those adopted by the ISB, a set of agency purchase order terms and conditions that have been approved by the agency Assistant Attorney General and are consistent with those adopted by the ISB. However, it is recommended that the Year 2000 compliance language be included with the purchase order as an additional term for any hardware, software, or firmware procured through this method.

The following is a non-exclusive checklist of topics to consider in developing public contracts:

A. State Sovereignty
    Draft the contract so it will not barter away essential state sovereignty.

B. Capacity
    Ensure the signers to the contract are authorized to bind the representative party.

C. Appropriations
    Verify the contract and maximum cost are within the scope and amount of the agency's appropriation.

D. Scope of Work and Period of Performance
    Draft the contract to clearly describe the authorized work and time of performance. Include provisions on what services or products must be delivered and how satisfactory completion of work will be verified. Include provisions on the effect of work delays.

E. Indemnification
    Do not include unlawful indemnification by the state in the contract.

F. Advance Payments and Interest
    The contract cannot require the state to make payments in advance of receipt of goods or services in violation of RCW 43.88.160(2)(d), nor can the contract require illegal interest amounts in violation of chapter 39.76 RCW.

G. Nondiscrimination
    The contract must contain appropriate clauses requiring that the vendor not discriminate on the basis of race, creed, color, national origin, families with children, sex, marital status, age, or the presence of any sensory, mental, or physical disability or the use of a trained guide dog or service dog by a disabled person in accordance with chapter 49.60 RCW.

H. Insurance Cancellation
    If the contract calls for insurance to be obtained by the vendor, ensure the contract contains the statutory 45-day notice in advance of cancellation.

I. Consideration
    The contract must include consideration (i.e., an exchange of something of value) to support the exchange of promises. A gift of public funds would be in violation of Article 8 sections 5 and 6 of the Washington Constitution.

J. Liquidated Damages
    If the contract contains a liquidated damages clause, it must establish a measure of damages which covers those damages which could reasonably be anticipated by the parties to the contract and it must state that these damages do not constitute as penalty.

K. No Damages for Delay
    The contract cannot contain an unauthorized "no damages for delay" clause. Determine whether the agency intends to be liable for damages for delay in accelerated completion dates and if not, be sure the language in the contract does not indicate that the state waives its reliance on the stated completion date in the contract.

L. Compliance with Bid Laws
    The contract must indicate the award of the contract was in compliance with the competitive bid requirements stated in chapter 43.105 RCW and chapter 39.30 RCW.

M.   Filing Requirements
The contract must be in compliance with the filing requirements for interlocal agreements as provided in chapter 39.34 RCW (chapter 39.29 RCW for personal services contracts) and approval requirements of purchased goods and services contracts in accordance with chapter 43.105 RCW.

N.   Termination for Convenience
The contract should contain a clause which allows the state to terminate the contract for convenience. Under such circumstances, the state is usually required to pay for the reasonable value of services received.

O.   Merger
The contract should contain a merger clause which states the contract is the complete agreement of the parties and all understandings are contained therein.

P.   Governing Law and Venue
The contract should provide for appropriate governing law and venue.

Q.   Nonassignment Clause
The contract should contain a clause requiring approval prior to any assignment of rights in the contract.

R.   Minority and Women Business Enterprise (MWBE) Requirements
Each agency must comply with MWBE requirements as specified in chapter 39.19 RCW. If necessary to meet agency goals, the contract must include the MWBE goals and requirements.

S.   Contracting out
The contract may not violate the "contracting out" restrictions, included in RCW 41.06.380 and any applicable collective bargaining agreements.

T.   Independent Capacity
The contract should specify that the vendor is not an employee of the state under the definitions used in chapter 51.08 RCW.

U.   Dispute Resolution
The contract should contain a provision for mediation or other method of alternative dispute resolution.

V.   Compensation
A maximum compensation amount must be stated in, or calculable from, the contract.

W.   Confidentiality and Conflict of Interest
All confidentiality and conflict of interest issues of both the vendor and the state (including ethics under chapter 42.52 RCW, public disclosure and client confidentiality) must be addressed in the contract.